Supreme Court, U.S.
FILED
NOV 13 1995
CLERK

No. 94-806 (16)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

REV. WILLIAM LAWSON ET AL., APPELLANTS,

ROBERT REYES, ET AL., APPELLANTS

*v.*

AL VERA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

## REPLY BRIEF OF APPELLANTS

ANTONIA HERNANDEZ
ANTHONY E. CHAVEZ
Mexican American Legal Defense & Educational Fund
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512

CARMEN RUMBAUT
*Counsel of Record, LULAC Appellants*
Mexican American Legal Defense & Educational Fund
140 E. Houston, Suite 300
San Antonio, Texas 78205
(210) 224-5476

**Additional Counsel Inside Cover*

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
Associate Director-Counsel

NORMAN J. CHACHKIN
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

PENDA D. HAIR
*Counsel of Record, Lawson Appellants*
NAACP Legal Defense & Educational Fund, Inc.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

26 pp

CHARLES DRAYDEN
Drayden, Wyche & Wood,
L.L.P.
1360 Post Oak Blvd.
Suite 1650
Houston, Texas 77056
(713) 965-0120

LAWRENCE BOZÉ
2208 Blodgett
Houston, TX 77004
(713) 520-0260

KEVIN WIGGINS
White, Hill, Sims & Wiggins
2500 Trammel Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 954-1700

## TABLE OF CONTENTS


PAGE

Table of Authorities ..... ii

SUMMARY OF ARGUMENT ..... 1

I. STRICT SCRUTINY IS INAPPLICABLE ... 4

A. Deliberate Creation Of A Minority Opportunity District Does Not Mean That Race Predominated ..... 4

B. *Miller* Requires Examination Of *Why* A District's Shape Is Irregular ..... 6

C. Protection Of Incumbents Is A Legitimate, Non-Racial State Interest ..... 8

II. DISTRICTS 18, 29 AND 30 SATISFY STRICT SCRUTINY ..... 12

A. The "Strong Basis in Evidence" Standard Applies ..... 12

B. Texas Had a Strong Basis in Evidence That The *Gingles* Preconditions Existed With Respect To Districts 18, 29 and 30 ..... 13

1. Reasonably compact opportunity districts ..... 14

2. Racially polarized voting ..... 16

III. PLAINTIFFS DO NOT HAVE STANDING . 19

CONCLUSION ..... 20

## TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| *DeWitt v. Wilson*, 115 S. Ct. 2637 (1995), *affirming*, 856 F. Supp. 1409 (E.D. Calif. 1994) | 1, 6 |
| *Golden v. Zwickler*, 394 U.S. 103 (1969) | 19 |
| *Growe v. Emison*, 113 S.Ct. 1075 (1993) | 14 |
| *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) | 14 |
| *Jeffers v. Clinton*, 730 F. Supp. 196 (1989), *aff'd*, 498 U.S. 1019 (1990) | 14 |
| *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994) | 14 |
| *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), cert. denied, 114 S. Ct. 878 (1994) | 18 |
| *Miller v. Johnson*, 115 S. Ct. 2475 (1995) | *passim* |
| *Shaw v. Hunt*, Nos. 94-923, 94-924, probable juris. noted, 115 S. Ct. 2639 (1995) | 8, 13 |
| *Shaw v. Reno*, 113 S. Ct. 2816 (1993) | 1 |
| *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991) | 16 |
| *Thornburg v. Gingles*, 478 U.S. 30 (1986) | *passim* |
| *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990) | 18 |
| *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) | 13 |

**OTHER AUTHORITY** **PAGE**

R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice 555 (7th ed. 1993) . . . . . 6

## REPLY BRIEF OF APPELLANTS

## SUMMARY OF ARGUMENT

In our opening brief, we drew from *Miller*, *DeWitt* and *Shaw*,[1] several conclusions of law about the meaning of *Miller's* "dominant and controlling rationale," 115 S. Ct. at 2486, standard for triggering strict scrutiny:

1. A deliberate intent to create a majority-black or majority-Hispanic district does not mean that race was the "dominant and controlling rationale."[2]

2. Where the decision to create a minority opportunity districts is based on a large African-American or Hispanic population concentration, sufficient to permit election of a candidate of choice from a reasonably compact district, race was not the "dominant and controlling rationale," but instead played a role along with compactness.[3]

3. An irregularly shaped, majority-black or majority-Hispanic district is not per se subject to strict scrutiny; instead *Miller* requires examination of *why* the shape is irregular. 115 S. Ct. at 2490 (shape is not dispositive but may be evidence of motive).

We also set out in our opening brief several undisputed facts:

1. Reasonably compact versions of Districts 18, 29 and 30, with substantially the same racial and ethnic compositions, were available to the State.

---

[1] *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *DeWitt v. Wilson*, 115 S. Ct. 2637 (1995), *affirming in part, dismissing in part*, 856 F. Supp. 1409 (E.D. Calif. 1994); *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

[2] *Miller*, 115 S. Ct. at 2488 (plaintiff must prove that the Legislature subordinated compactness and other race-neutral districting principles to racial considerations).

[3] *See* Lawson-LULAC Br. 23-26 (deliberate creation of majority-black and majority-Hispanic districts in California plan affirmed in *DeWitt*).

2. The State reached its intent to create Districts 18, 29 and 30 as majority-black or majority-Hispanic based upon knowledge that sufficiently large population concentrations of African Americans and Hispanics existed to enable these minority groups to elect representatives of their choice from reasonably compact districts.

3. The reason the State chose irregular over regularly shaped versions of Districts 18, 29 and 30 was to protect white incumbents and to aid white Senator Gene Green.

If the above accurately describes both the law and the facts, then the conclusion seems inescapable that race was not the legislature's "dominant and controlling rationale" either in the decision to create Districts 18, 29 and 30 as minority opportunity districts (because compact population concentrations played an equal role) or in the shapes of those districts (because incumbent protection and other non-racial factors caused the shapes). This conclusion is bolstered by the many other reasons we identified as making strict scrutiny inapplicable,[4] to which appellees make no reply.

We search the Brief for Appellees in vain to find a dispute with the legal conclusions, the logic or the facts above. We find no real dispute, other than the disingenuous claim that incumbents impacted the district lines only "at the margins," discussed in more detail below. When the rhetoric is cleared away, the Brief for Appellees seems to rely on five propositions of law, which we shall show to be untenable:

---

[4]Other indicia that race was not the legislature's "dominant and controlling rationale" include the fact that minority residents were included because they wanted to be in the districts and they were likely to vote for the incumbent or aspiring incumbent; that the districts include persons with "actual shared interests," who "live together in one community," *Miller*, 115 S. Ct. at 2481, 2490; that majority-white districts are highly irregular in shape; and that other minority district proposals were rejected by the Legislature.

1. The intent to create a minority opportunity district, formed "at the beginning of the process," constitutionally taints everything that follows.

2. An intent to create a minority opportunity district can be accomplished only with compact districts, even if the State has non-racial reasons to use an irregularly shaped district instead.

3. An irregularly shaped, minority opportunity district in which some of the irregular lines correlate with racial population patterns is per se subject to strict scrutiny, without regard to the causes that explain why irregular lines came to exist.

4. Protection of incumbents is not a legitimate state interest if it leads to irregular district shapes.

5. In Texas, protection of white incumbents was accomplished by "assigning voters to congressional districts based on race," Br. Appellees 41, and therefore the adjoining minority districts are subject to strict scrutiny.

On the application of strict scrutiny, our opening brief set out the familiar "strong basis in evidence standard" for determining whether a State had a compelling interest. Appellees disagree, asserting that the State must "be right." The rest of appellees' compelling interest discussion flows from the "State must be right," standard, asserting facts under *Gingles*[5] that they claim the State got "wrong." We urge adherence to the long line of precedents upholding the "strong basis in evidence" standard, and briefly point out flaws in appellees' factual claims, including their flagrant, improper reliance on an extra-record document.

Finally, on standing, we point out that appellees have virtually conceded that the plaintiffs who live in Districts 29 and 30 have identified no particularized, personal injury.

---

[5] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

We also point out that failed candidate Blum has no current controversy related to his previous *candidacy*, because he has made no showing that he intends to seek election to Congress again.

## I. STRICT SCRUTINY IS INAPPLICABLE

Appellees claim that the district court correctly predicted and properly applied *Miller v. Johnson*. As set out in our opening brief, the court below did not apply the *Miller* test, but rather a completely different one under which the mere combination of an intent to create a minority opportunity district, with an odd shape, triggers strict scrutiny, regardless of the motive for choosing one shape over another. Lawson-LULAC Br. 30-37. The lower court compounded its error by confusing correlations with motive in concluding that the placement of minority voters into white Democrats' districts constituted racial gerrymandering that caused the adjacent minority districts to be subjected to strict scrutiny. *Id.* The "clearly erroneous" standard of review does not apply where the court below applied the wrong legal rules.

Building on the legally erroneous test applied by the court below, appellees' brief is largely devoted to extensive "proof" of two uncontested facts: 1) that the State had a "goal" to create two African-American and one Hispanic opportunity district in Houston and Dallas; and 2) that the districts actually created are irregularly shaped. What appellees fail to provide is the *link* between the goal and the shape, a *link* that we contend logically and factually is absent in this case.

### A. Deliberate Creation Of A Minority Opportunity District Does Not Mean That Race Predominated

Appellees devote inordinate attention to proving that Texas had a "goal" to create Districts 18, 29 and 30 as minority opportunity districts "from the very beginning of the

redistricting process." Br. Appellees 31.[6] Yet, *Miller* holds that where "the legislature's decision to place a significant number of voters within or without a particular district" was made in harmony with "traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions, or communities defined by actual shared interests," race did not predominate. 115 S. Ct. at 2488. Where, as here, the Legislature reaches its goal to place a majority of minority voters into a district on the basis of compact population concentrations and communities defined by actual shared interests, *Miller* holds that the existence of such a goal does not taint the rest of the process.

If, as appellees imply, the intentional decision to create a minority opportunity district automatically triggers strict scrutiny, all 39 majority-black congressional districts nationwide and all 19 majority-Hispanic congressional

---

[6]Appellees cite as evidence of race predominance the fact that the Legislature "early on" agreed that these three districts would be created and "[d]espite fierce pressure from House incumbents concerned about their reelection prospects, Texas never wavered" from this decision. Br. Appellees 31. Appellees also fault Texas for offering "no other explanation for the racially dominant nature of these districts," *id.* at 41. Of course, these criticisms could be equally levelled at Texas' six other minority opportunity districts and many other voting rights districts.

The *Terrazas* testimony and other material cited, *e.g.*, *id.* at 9-10, 17-19, 32-33, establish only that African-American and Hispanic leaders advocated creation of some version of these three minority opportunity districts, not that the Legislature subordinated other interests to this goal. That then Senator (now Congresswoman) Johnson's and Rep. Martinez' initial proposals both were rejected because of their impact on white incumbents and an aspiring white Senator demonstrates that while minority opportunity districts may have been the primary consideration for some minority politicians, they were forced to compromise so that the State could achieve its overriding goal of protecting all 27 incumbents. Appellees' other quotations of State officials merely show that minority opportunity districts were one state objective. *E.g.*, *id.* at 32 (Sharman testimony that race was "*one* of the major reasons").

districts, as well as the thousands of majority-black and majority-Hispanic state legislative and local districts, would be subject to strict scrutiny. Few of these districts became African-American or Hispanic opportunity districts accidentally. Instead of addressing how the Court's summary affirmance of California's nine intentionally-created African-American and Hispanic opportunity districts in *DeWitt* affects this case, appellees mischaracterize the Court's action as dismissal for lack of a substantial federal question.[7]

Appellees' explanation of how their test would apply to other districts is disingenuous, to say the least. While lauding the lower court's discernment, and hailing the "manageability" of the district court's test, Br. Appellees 23, appellees "respectfully disagree" with the district court's conclusion that the other 21 challenged districts should not be subjected to strict scrutiny, *id.* at 21 n.22. They berate our concern about the scope of their test as "Chicken Little cries," *id.* at 23; yet, appellees opine that "almost all of Texas' congressional districts" "appear to be drawn exclusively to achieve the desired racial composition," *id.* at 13 & n. 12.

### B. *Miller* Requires Examination Of *Why* A District's Shape Is Irregular

Appellees agree with the court below that an intent to create a minority opportunity district, combined with a district that is irregularly shaped, automatically triggers strict scrutiny, even where a compact version was available and regardless of whether the State's choice of the irregular version was motivated by non-racial goals. Br. Appellees 33. This standard is untenable under *Miller*, which clearly states that racial *motive* is the touchstone.

---

[7]Br. Appellees 21, n.22. While claims other than racial gerrymandering were dismissed, "[w]ith respect to questions 1 through 4 ..., *the judgment is affirmed.*" 115 S. Ct. 2637 (emphasis added).

We also pointed out in our opening brief that the district court's failure to consider the highly irregular shapes of Texas' majority-white districts, as evidence of a general, non-racial abandonment of compactness, resulted in a double standard, treating minority voters, minority candidates and minority incumbents worse than white voters, candidates and incumbents. Appellees' brief endorses the same double standard. Appellees *agree* that the double standard exists and claim that the Fourteenth Amendment requires it, Br. Appellees 63-64. We submit that such a double standard stands the Fourteenth Amendment on its head.[8]

Appellees' suggestion that strict scrutiny is automatically required where some of a district's irregular lines correlate with racial population is equally in error. First, the evidence shows that district lines would not have been irregular but for the non-racial goal of protecting incumbents and accommodating Senator Green. Second, in building a minority opportunity district, it is no surprise that some of the district lines correlate with racial population concentrations.[9] What is of more significance is that the irregular "arms" of the districts bring in substantial majorities

---

[8] *See, e.g., Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring)("the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks").

[9] Appellees also complain about split VTDs. Splitting VTDs is not an evil phenomenon; it merely means that the State districted at the census block level (using census blocks, rather than the larger VTDs, as the building blocks for districts), a common practice in urban areas. In any event, the original proposals by Senator Johnson and Rep. Martinez did not split VTDs, and there is no dispute that the reason the State went to the census block level in District 29 was to offset the influence of white Senator Gene Green. Although the court below complained of borders changing from one side of the street to the other, we know of no evidence that the State ever went below the census block level in creating these districts. Because a census block is the equivalent of a city block, by necessity the middle of some streets will serve as boundary lines.

of white, not minority, voters.[10]

On this point, we note the Brief of Amici Curiae North Carolina Legislative Black Caucus et al., submitted in *Shaw v. Hunt*, Nos. 94-923, 94-924. It highlights the "simple fact of mathematics that "the more values that 'enter into a legislature's redistricting calculus,' the fewer the possible solutions." *Id.* at 19 (quoting *Miller v. Johnson*). Thus, "[i]ronically, the irregularity of a district's shape may in fact be powerful evidence that racial considerations, while undoubtedly present, did *not* predominate and instead were part of a complex calculus," *id.* at 20.

### C. Protection Of Incumbents Is A Legitimate, Non-Racial State Interest

Appellees appear to assert three arguments as to why protection of incumbents should not be considered a legitimate, non-racial influence that explains the odd shapes of Districts 18, 29 and 30. First, they claim that incumbents

---

[10]J.A. 335, 341, 342. The maps attached to appellees' brief themselves rebut appellees' description of "integrated" urban areas, of "precise racial cuts corresponding to bizarre shapes" and of tendrils to capture minority population. As to District 30, the maps and data reveal that African Americans are highly concentrated in South Dallas, with 50% of District 30 comprised of a core area that is 69% black. This concentration of black population is shown in the fold-out of PX 34H2, attached to Brief for Appellees. *See also* J.A. 335. The "arms" of District 30 are majority-white. Although in some places the "arms" pick up black population, these parts of the "arms" do not "predominate" in the overall construction of the district, as the overlay map of PX 34H2 makes clear. The portion of District 30 in Collin County (Plano) includes only 1398 blacks, PX 34P, at 16, or 0.02% percent of the district's total population. The partisan shading maps reveal that in going north to pick up population, District 30 was severely constrained by huge concentrations of heavily Republican territory. The fold-out map of TX Ex. 9A(2), when compared with the overlay map of PX 34H2, clearly demonstrates that District 30's "arms" are much more highly correlated with Democratic partisan affiliation than with race.

"influence[d] the district lines at the margins" only. Br. Appellees 31-32. The record and the lower court's findings make clear that, whether "marginal" or otherwise, satisfying the political needs of incumbents and one white aspirant (Gene Green) is what is at issue in this case, since it caused the district lines to be irregular.[11] Plaintiffs' main witness, Rep. Grusendorf, explained that "[t]his plan was drawn with only one thing in mind, and that is to protect Democratic incumbents, period." J.A. 380 (Texas House Floor Debate, Aug. 21, 1991). The court below found that incumbent protection caused the irregularities in Districts 18 and 29 in Houston. TX J.S. 55a-56a (quoted in Lawson-LULAC Br. 4-5).

Second, appellees' footnotes recite the district court's position that incumbent protection is not a legitimate state interest when it is done aggressively and leads to "the representatives [selecting] the people." Br. Appellees 42, n. 35. This argument is contrary to *Miller* and to the principle of federalism, for reasons set out in our opening brief, at 30-33. In essence, this claim is that Texas cannot both intentionally create African-American and Hispanic opportunity districts and protect its incumbents.[12]

---

[11]If the influence of incumbents was only "at the margins," then the differences between the final districts, compared to Senator Johnson's and Rep. Martinez' initial proposals and to the ideal districts set out in State Ex. 12 presumably are only marginal.

[12]If one of these goals must be sacrificed, the Court should leave no doubt in its instructions to the court below that it is the white incumbents who must be sacrificed on the altar of compactness. Obligations under the Voting Rights Act take precedence over protecting white incumbents.

Alternatively, appellees may be suggesting, given their endorsement of the double standard, that both goals can be achieved only if the State draws perfectly compact minority opportunity districts, surrounded by bizarre majority-white, incumbent-protection districts, that stretch as far as necessary to find enough Democrats. Such districts appear to raise neither racial gerrymandering nor actionable partisan

Third, appellees adopt the reasoning of the court below that "the state's use of race to accomplish this goal [protecting incumbents] requires ... strict scrutiny." Br. Appellees 41. Appellees do not contradict the undisputed evidence that white Democrats wanted to include minority voters in their districts *because they are Democrats*, not because they are African American or Hispanic.[13] In view of the high correlation between race and partisan affiliation that exists in many places, a rule of law prohibiting mere consciousness of race in constructing districts designed to be predominantly Democratic or Republican would likely invalidate almost all currently existing congressional districts in all States with significant minority populations. Appellees' challenge to 18 majority-white districts and their continued assertion that those districts are subject to strict scrutiny, Br. Appellees 21, n.22, confirms that their test means an open-season on majority-white districts located in the vicinity of any concentration of African-American or Hispanic voters.

Indeed, the result of such a ban on consciousness of race would be particularly harmful to African Americans and Hispanics who affiliate with the Democratic party. The logical way for States to comply with appellees' rule of law would be to put significant numbers of African-American and Hispanic voters into majority-Republican districts. However, according to the record, 97% of Texas' African-American voters and over 70% of the State's Hispanic voters, affiliate with the Democratic party. Appellees' rule of law seeks to submerge minority voters in districts where

---

gerrymandering issues.

[13]The record reveals the exaggeration in appellees' claim that District 30 "excludes a significant percentage of the Dallas County black community which was placed in CDs 5 and 24," Br. Appellees 65. District 5 includes 33,589 African Americans from Dallas County, PX 34Q, at 22, while District 24 includes 19,737 African Americans from Dallas County, *id.* at 121, for a total of 53,326, or 2% of all African Americans in Dallas County.

they are in the minority both in partisan and racial affiliation.[14]

Apparently conceding that including minority voters in white Democratic districts does not involve race as a *motive*, appellees reframe the district court's theory as "race ... as a *tool*." Br. Appellees 22 (emphasis added). This slogan apparently is intended to imply that the State used race to identify likely Democratic voters. *See id.* at 41 (referring to race as a proxy without saying a proxy for what).[15] Yet, appellees admit the State had on its districting computers, by precinct, partisan voting patterns in elections that are reliable indicators of partisan affiliation. *Id.* at 12. Thus, the State knew directly where the Democrats were and did not need to use "race as a proxy" for Democrats.[16]

---

[14]Appellees appear to assert that the Constitution requires submerging minority voters into Republican-majority districts. Br. Appellees 38 (claiming that Texas' majority-Republican districts are unconstitutionally deprived of a multiracial character). This effort to submerge known Democrats into Republican districts is, of course, consistent with plaintiffs' *partisan* goals. Lawson-LULAC Br. 29.

[15]In a State where 97% of African Americans are Democrats, PX 6E6 (quoted by lower court, TX J.S. 33a), it hardly seems fair to accuse the State of "assum[ing], without evidence," Br. Appellees 41, that African-American voters are likely to be Democrats.

[16]Appellees apparently believe that the State used race to identify likely Democratic voters when districting at the census block level, where partisan voting patterns were not on its computer system. (Such partisan voting data was available to Democrat incumbents from the national party, which had computerized primary sign-in data). The logic of this contention, as it applies to minority opportunity districts, is that the State used census block racial data to put *white voters into minority districts*, and *minority voters into white districts*. This is precisely the opposite of the contention made elsewhere by appellees that the State was intentionally splitting VTDs to bring *minority voters into the minority districts*. Using race as a "tool" to identify Democrats works only if the VTD is being split between a Republican and a Democratic district, which is not the

## II. DISTRICTS 18, 29 AND 30 SATISFY STRICT SCRUTINY

### A. The "Strong Basis In Evidence" Standard Applies

Extensive, largely undisputed evidence in the record establishes that the State and the defendant-intervenors *proved* all three *Gingles* preconditions. Nonetheless, it is important to note that the State's burden in defending a race-conscious remedial action from *constitutional* challenge is to show that it had "a strong basis in evidence of the harm being remedied." *Miller*, 115 S. Ct. at 2491.

Appellees argue that strict scrutiny requires "the State to be 'right' and not just reasonable." Br. Appellees 46. The "strong basis in evidence" standard has been consistently applied to race-conscious affirmative action. Lawson-LULAC Br. 45-46. There is no reason to depart from normal strict scrutiny analysis and to require a heightened level of certainty for state or local governments voluntarily seeking to comply with § 2 of the Voting Rights Act or to remedy racially polarized voting that results from a history of official discrimination.

For the same reasons, states must be permitted to rely on precedents that existed at the time districting decisions were made regarding the legal standards. Where no clear precedent exists, states must have some latitude to reach reasonable interpretations of the law.[17] To require

---

case in drawing district line between white Democratic districts and minority opportunity districts, also majority-Democrat. If the State used race in splitting VTDs between two majority-white districts, such action would not have affected the minority opportunity districts.

[17]The question is not whether a Voting Rights Act plaintiff would have succeeded in a § 2 lawsuit, but whether the State had a compelling reason for race-conscious action. The Voting Rights Act is a remedial statute, enacted and amended as recently as 1982 on the basis of an overwhelming record before Congress that African Americans and other

absolute certainty in predicting how a federal court years later will decide every factual question and every undecided issue of § 2 law would deny governments any way to avoid the "competing hazards" of liability, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290-91 (1986) (O'Connor, J., concurring in part and concurring in the judgment).[18] The "strong basis in evidence" standard permits the State a small amount of leeway to resolve uncertainties in favor of the interpretation that fosters compliance with the Voting Rights Act.

### B. Texas Had A Strong Basis In Evidence That The *Gingles* Preconditions Existed With Respect To Districts 18, 29 And 30

To avoid duplication, the Lawson-LULAC appellants rely on the briefs of the State and the United States on most issues regarding the application of § 2 to Texas in 1991.[19]

---

racial and language minority groups were being denied, on a widespread basis, an equal opportunity to elect their candidates of choice. It follows that voluntary compliance with § 2, to the best of the State's ability, is in itself a compelling interest. The open issues of interpretation of the Voting Rights Act turn not on constitutional law, but on ascertaining the meaning and intent of Congress, *i.e.*, statutory interpretation. For purposes of evaluating a State's decision under the compelling interest standard, it should be sufficient to determine whether the State's interpretation of law was reasonable and not itself unconstitutional.

[18]If the State fails to create minority opportunity districts and a federal court later rules that the *Gingles* preconditions existed, it faces liability to § 2 plaintiffs. If it creates such districts and a federal court later rules that the evidence, while "firm," does not quite conclusively prove the *Gingles* preconditions, then the State faces liability for violating the Constitution.

[19]On narrow tailoring, we also note the Brief of Amici Curiae North Carolina Legislative Black Caucus et al., submitted in *Shaw v. Hunt*, Nos. 94-923, 94-924, at 13-19, setting out numerous examples of state and local jurisdictions which have been permitted by courts to construct non-compact remedial districts for § 2 violations.

We briefly discuss below the State's strong basis in evidence that reasonably compact versions of the minority opportunity districts existed and that voting was racially polarized.

1. *Reasonably compact liability districts.*

Several reasonably compact[20] versions of District 30, which would have permitted African Americans to elect their candidate of choice could have been constructed with South Dallas as the District's anchor. Lawson-LULAC Br. 8-10.[21]

Appellees err in claiming that Houston has become

---

[20]Appellees suggest for the first time on appeal that the district set out in TX Ex. 12C is not "compact." *Gingles* requires only that a hypothetical liability district be "reasonably compact," a standard this exhibit clearly meets, particularly in comparison with district shapes used by Texas in the past. *See* J.S. 138 (map of 1980's congressional plan, showing many districts less compact than TX Ex. 12C, such as CDs 4, 5, 6, 14, 26). *See also, Jeffers v. Clinton*, 730 F. Supp 196 (E.D. Ark 1989), *aff'd*, 498 U.S. 1019 (1990)(irregularly shaped districts are reasonably compact when viewed in functional terms, taking into account State's normal districting practices).

[21]Appellees claim that none of the alternative versions of District 30 would meet *Gingles* first precondition because all were less than an absolute majority of black population, including TX Ex. 12C, with 49.7% black population. In a multi-ethnic situation, an absolute majority requirement makes little sense, since the dominant group in voting strength will elect its candidate of choice unless the other two groups coalesce perfectly against it. In contrast, the case cited by appellees, *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991), Br. Appellees 48, involved a minority group only 5% of the population. In any event, the Court has reserved deciding whether an absolute majority is required to meet *Gingles* first precondition, *Gingles*, 478 U.S. at 46 n.12; *Growe v. Emison*, 113 S.Ct. 1075, 1084 n.5 (1993); *Johnson v. De Grandy*, 114 S. Ct. 2647, 2656 (1994), and the State made a reasonable choice to recognize the minority population concentration in Dallas, which all agree is large enough to elect its candidate of choice. *See, e.g. De Grandy*, 114 S. Ct. at 2655 (emphasis added)("the first *Gingles* condition requires ... reasonably compact districts *with a sufficiently large minority population to elect candidates of its choice*").

racially integrated and therefore that single-race, minority opportunity districts were impossible. The record shows no significant integration in the sense that whites, Hispanics and African Americans are living side by side. Instead, what appellees' own maps reveal are several large, distinct, racially segregated neighborhoods.[22] Although African-American and Hispanic neighborhoods cross each other downtown,[23] reasonably compact districts encompassing a functional majority of each group are possible.[24]

---

[22]*See* PX 34H9, 34H8, attached to Appellees' Brief.

[23]The maps attached to Appellees' Brief show that the Hispanic population concentration runs in a rough "L" shape north and east of downtown, while the African American population forms a rough "Y" starting from the south.

[24]Lawson-LULAC Br. 6-7 & nn. 12, 13. Contrary to appellees' claim, the United States did not say that is impossible to create simultaneous, "reasonably compact" African-American and Hispanic opportunity districts in Harris County. The United States suggests that it is unclear whether this was possible, indicating only that plaintiffs' expert raised questions about the compactness of the African-American opportunity district in the Owens-Pate plan. Br. United States 10. A comparison of District 18 in the Owens-Pate plan, J.A. 142, with prior districts drawn by the State, *see* J.S. 138 (*e.g.*, prior CDs 4, 5, 6, 14), leads to the firm conclusion that the relevant districts in the Owens-Pate plan are "reasonably compact" under *Gingles*. In any event, as noted by the United States, Texas acted reasonably when faced with the certain knowledge that non-simultaneous majority-black and majority-Hispanic districts were possible.

Appellees assert that citizen voting age population (CVAP) data establish that the *Gingles* threshold could not be met for a Hispanic opportunity district in Harris County. CVAP data was not available when the State redistricted in 1991. Based on the information available, the State had a strong basis for concluding that a district with a super-majority of Hispanic voting age population would permit Hispanic voters the opportunity to elect the candidate of their choice. The fact that District 29 has not yet realized this potential has more to do with the State's accommodation of Senator (now Congressman) Green than it does with the potential voting strength of Hispanic voters in Harris

2. *Racially polarized voting.*

Overwhelming evidence establishes that the State had a "strong basis" for concluding that voting was racially polarized in the areas in which Districts 18, 29 and 30 are located. Before addressing the merits of appellees' new claims on this topic, the Lawson-LULAC appellants strongly object to appellees' citation, at least 18 times, of a 62-page, extra-record document, which was not before the trial court and is not properly before this Court. This document, entitled *Minority Voting Rights Analysis for the Texas House of Representatives 1991 Redistricting Plan*, is an advocacy piece submitted by Texas in an effort to obtain pre-clearance, not of the 1991 congressional plan, but rather of a State House of Representatives plan that was ultimately enjoined by both federal and state courts. *See Terrazas v. Slagle*, 789 F. Supp. 828, 837 (W.D. Tex. 1991). Appellees repeatedly cite factual assertions in the *Minority Analysis* for the truth of the matters asserted. Appellants did not have the opportunity to cross-examine the authors or to present any evidence as to either the credibility or the accuracy of the self-serving statements in this document, because it was not offered in evidence. Appellees' pervasive citation to factual claims in an extra-record document "lodged" with the Court is no different than if they wanted to call witnesses to testify in this Court. The trial has been over for 17 months.[25] Appellees' desperate effort to supplement the

---

County.

[25] *See, e.g.*, R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice 555 (7th ed. 1993) ("[S]ome counsel have sought to influence the court's decision in a case by attaching to a brief ... some additional or different evidence that is not part of the certified record, such as an affidavit or an unsworn statement. Such an effort, as well as any argument based thereon in the brief or petition, has consistently been condemned by the Court.").

record with unproven, unreliable material must not be countenanced. The Court should ignore this document and should order appellees to black out all portions of their brief that refer to it.

Appellees' valiant effort, for the first time on appeal, to argue that voting in Texas is not racially polarized, is a mishmash of statewide election data,[26] extra-record citations and hearsay. Appellees' post-trial search for extra-record hearsay conveniently ignores the record in this case, in which their own expert found virtually the same levels of racially polarized voting as did the State's expert witness.[27]

Distortions so pervade appellees' no-polarized-voting argument[28] that it is impossible to address more than a few examples here. A persistent example is appellees' citation of instances in which Hispanic cross-over voting provided the margin of victory for African-American candidates as "overwhelming" "evidence of *Anglo* cross-over voting for minority candidates." Brief for Appellees 5 (emphasis

---

[26]For example, appellees rely on statewide election of a few officeholders, such as Attorney General Morales. Brief for Appellees 3. Yet, when focused on the relevant district, the story is totally different. In the 1990 Democratic party primary, Attorney General Morales received only 14% of the white vote in the challenged Hispanic opportunity District (CD 29), while the Hispanic candidate for State Treasurer received 0% of the white vote in District 29 in that primary, TX Ex. 14, App. 2, Table 8. General Morales received 84% of the Hispanic vote in District 29, *id.*, showing that regardless of Morales' success statewide, voting is highly polarized in District 29.

[27]PX 36E, Att. F.

[28]For example, appellees recite a series of elections won by Hispanics and African Americans to the U.S. House of Representatives and the State Legislature, Brief for Appellees, 4, 6, without revealing that *these representatives were elected from majority-non-white districts*.

added).[29]

In Dallas County, appellees rely upon the 1993 *LULAC* decision,[30] which addressed only low profile judicial elections in which straight party voting prevails, and a few local 1995 elections.[31] What was before the Legislature in 1991 was the 100-page exhaustive documentation of racially polarized voting in Dallas by the federal court in *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990), decided on the eve of redistricting.

---

[29]Appellees claim that 100% success of African American voters' candidates of choice in majority-minority District 18 is "overwhelming evidence" of *white* cross-over voting, Br. Appellees 5, when, in fact, Dr. Lichtman's comprehensive analysis of relevant elections found that whites voted for black candidates in non-judicial elections only 16% of the time in District 18, TX Ex. 14, App. B, last page of Table 3. (The Tables in TX Ex. 14, Dr. Lichtman's Final Report, are not included in the Joint Appendix, but are in the record that has been deposited with the Clerk).

Appellees' claim that PX 14K, J.A. 137, shows "a significant number of *white* voters supporting black and Hispanic candidates in both primary and general elections," Brief for Appellees 4 (emphasis added), is simply an expanded version of this same distortion. Although PX 14K is so vague as to be of no probative significance, one thing about it is clear: it could not possibly reflect elections in majority-white state Senate or congressional districts involving African American or Hispanic candidates because no African American or Hispanic has ever been elected to the State Senate or the United States Congress from a majority-white Texas district. TX Ex. 17, at 51.

[30]In *LULAC v. Clements*, 999 F.2d 831, 883 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994), the Fifth Circuit found that highly polarized voting patterns also corresponded to party affiliation. Even assuming, *arguendo*, that this is the correct standard, Dr. Lichtman's analysis in this case found voting to be highly polarized by race in primary elections, where partisan affiliation obviously cannot be the explanation.

[31]Appellees citations to 1995 newspaper articles give no data on the racial and ethnic composition of the electorate in those elections.

Appellees barely acknowledge this meticulous application of the *Gingles* criteria in a footnote near the end of their brief. Neither their effort to ignore nor their effort to discredit[32] this decision can be successful.

## III. PLAINTIFFS DO NOT HAVE STANDING

Appellees have virtually conceded lack of standing in Districts 29 and 30. They make *no* argument that any of the plaintiffs who reside in these two districts has suffered individual, particularized harm. Pauline Orcutt, the sole plaintiff residing in District 30, is not mentioned in appellees' standing argument.[33] Appellees' brief also mentions neither of the two residents of District 29, Al Vera and Barbara Thomas, who testified to extraordinarily positive reactions to Congresswoman Sheila Jackson Lee (CD 18) and Congressman Gene Green (CD 29). *See* Lawson-LULAC Br. 61-62.

Appellees' standing argument boils down to: "Blum, *if no one else*, has suffered a particularized harm." Br. Appellees 28 (emphasis added). Yet, a disappointed candidate has no continuing standing unless he establishes as fact a firm intention to run again. *Golden v. Zwickler*, 394 U.S. 103, 117-118 (1969). Neither Blum's deposition nor his trial testimony reveal any such intention.

---

[32]Brief for Appellees at 50 n. 47. Appellees claim that the District Court somehow implemented Prof. Lani Guinier's views, citing for this proposition only a 1995 newspaper article whose author apparently disagrees with the Professor. Nowhere in the lengthy *Williams* opinion is Prof. Guinier mentioned; the District Court clearly followed the Voting Rights Act's guidelines, which are painstakingly applied.

[33]Moreover, appellees' theory of standing is that the plaintiffs have been assigned to a "particular district[t] ... *because of their race*." Br. Appellees 26-27. Yet, appellees' contention on the merits is not that *white* voters, such as Orcutt and Thomas, were assigned to districts because of their race. Under appellees' own version of the facts, they were assigned to districts in spite of their race.

## CONCLUSION

The decision of the district court should be reversed, and the complaint should be dismissed.

Respectfully submitted,

ANTONIA HERNANDEZ
ANTHONY E. CHAVEZ
Mexican American Legal Defense and Educational Fund
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512

CARMEN RUMBAUT
*Counsel of Record, LULAC Appellants*
Mexican American Legal Defense and Educational Fund
140 E. Houston, Suite 300
San Antonio, Texas 78205
(210) 224-5476

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
Associate Director-Counsel
NORMAN J. CHACHKIN
NAACP Legal Defense & Educational Fund, Inc.
Sixteenth Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

PENDA D. HAIR
*Counsel of Record, Lawson Appellants*
NAACP Legal Defense & Educational Fund, Inc.
1275 K Street, N.W.
Suite 301
Washington, D.C. 20005
(202) 682-1300

CHARLES DRAYDEN
Drayden, Wyche & Wood,
L.L.P.
1360 Post Oak Blvd.
Suite 1650
Houston, Texas 77056
(713) 965-0120

LAWRENCE BOZÉ
2208 Blodgett
Houston, TX 77004
(713) 520-0260

KEVIN WIGGINS
White, Hill, Sims &
Wiggins
2500 Trammel Crow
Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 954-1700

November 13, 1995